No. 18,834

In the United States Court of Appeals for the Ninth Circuit

JESS GREEN, APPELLANT

v.

ANGUS A. WILSON, ET AL., APPELLEES

Appeal from the United States District Court for the District of Idaho

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

RAMSEY CLARK,
Assistant Attorney General.

SYLVAN A. JEPPESEN,
United States Attorney,
Boise, Idaho, 83701.

ROGER P. MARQUIS,
RICHARD N. COUNTISS,
Attorneys,
Department of Justice,
Washington, D. C., 20530.

INDEX

CITATIONS

Cases:

Cases—Continued Page

Statutes:

Miscellaneous:

In the United States Court of Appeals for the Ninth Circuit

No. 18,834

JESS GREEN, APPELLANT

v.

ANGUS A. WILSON, ET AL., APPELLEES

Appeal from the United States District Court for the District of Idaho

---

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

I

INTEREST OF THE UNITED STATES

A detailed statement of the interest of the United States is contained in the Representation of Interest filed in the district court (R. 27-38). The Nez Perce Tribe has recovered $7,157,605 in judgments against the United States under the Indian Claims Commission Act, 60 Stat. 1049, 25 U.S.C. secs. 70 *et seq.* Congress has appropriated this sum, by the Act of April 24, 1961, Pub. L. 87-24, 75 Stat. 45, to be:

advanced or expended for any purpose that is authorized by the respective tribal governing bodies and approved by the Secretary of the Interior.

By this suit against the members of the tribal governing body (R. 28), appellant attacks the entire governmental system of the tribe as recognized and approved by the United States (R. 27-28) and attacks numerous specific expenditures made or contemplated by the tribal governing body. The expenditures specifically attacked include (1) the tribal sanitation facilities program (R. 2, par. V); (2) the development of tribal tourist enterprises (R. 2, par. V); and (3) the construction of tribal community centers (R. 2, par. VIII).[1] Each of the named projects, and numerous others that are dependent upon this tribal judgment fund, have been developed in cooperation with the Secretary of the Interior or his delegated representatives and have his tentative or final approval as required by the appropriation statute (R. 30-32). Appellant also requests an injunction against expenditure of any tribal funds by the tribal government (R. 3, par. IX (3)). The ultimate aim of the suit is to compel a per capita distribution of the entire judgment fund, in opposition to the uses now planned and contrary to the direction of Congress (R. 1, 2, pars. II, V).

The United States has a general interest in this suit because of its historic relationship with the tribe and as trustee of tribal funds. It has a specific inter-

---

[1] A forest project under consideration was also attacked (R. 5, par. V), but it has not been put into effect.

est because (1) the attack is on the only tribal government it recognizes; (2) the attack is on expenditures it has tentatively or finally approved; (3) the requested injunction would prevent it from making any tribal expenditures (whether or not from the judgment fund) that require concurrence with the tribal government; (4) an order for per capita distribution of the judgment fund would abrogate the congressional prohibition against expenditure of any of the tribal funds without approval of the Secretary of the Interior; and (5) court intervention would, in effect, confer on the courts the supervisory jurisdiction of the Secretary of the Interior over Indian affairs.

II

DISMISSAL OF THE SUIT WAS PROPER BECAUSE OF THE ABSENCE OF THE UNITED STATES, WHICH IS AN INDISPENSABLE PARTY

Essential to any meaningful relief for appellant are findings that the tribal government recognized by the United States is illegal,[2] that the expenditures ap-

---

[2] To the extent that this suit attempts to attack the governmental organization of the tribe, it must fail because of the tribe's sovereign immunity from suit. *United States* v. *U.S. Fidelity Co.*, 309 U.S. 506, 512 (1940) (appellant relies upon the court of appeals' opinion that was reversed, Br. 29); *Turner* v. *United States*, 248 U.S. 354, 358-359 (1919); *Haile* v. *Saunooke*, 246 F.2d 293, 297 (C.A. 4, 1957), cert. den., 355 U.S. 893, and cases there cited. And the tribe may not be sued indirectly by naming only the officers, since the attack obviously is upon the officers' official authority and official action. *Barnes* v. *United States*, 205 F.Supp. 97, 100 (D. Mont. 1962), and cases there cited.

proved by the United States are illegal, that issuance of the injunction freezing tribal funds held by the United States is justified, and that appellant is entitled to a vested per capita share of the judgment fund. Because of the inescapable involvement of the United States in all of these matters, we submit that the United States is an indispensable party to this suit and cannot be joined because of the absence of consent.

The classic definition of indispensable parties is stated by the Supreme Court in *Shields* v. *Barrow*, 17 How. 130, 139 (1854):

> Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.

This court traced the history of this definition in some detail in *State of Washington* v. *United States*, 87 F.2d 421, 425-428 (1936), and then set forth the following test for determining when a party is indispensable (pp. 427-428):

> * * * After first determining that such party is interested in the controversy, the court must make a determination of the following questions applied to the particular case: (1) Is the interest of the absent party distinct and severable? (2) In the absence of such party, can the court render justice between the parties before it? (3) Will the decree made, in the absence of such party, have no injurious effect on the interest of

> such absent party? (4) Will the final determination, in the absence of such party, be consistent with equity and good conscience?
>
> If, after the court determines that an absent party is interested in the controversy, it finds that all of the four questions outlined above are answered in the affirmative with respect to the absent party's interest, then such absent party is a necessary party. However, if any one of the four questions is answered in the negative, then the absent party is indispensable.

Asking these questions about the interest of the United States, we find that at least the first and third questions must be answered in the negative.

If it were possible for appellant to overcome the tribe's sovereign immunity (*supra*, fn. 2), the attack upon the governmental organization is a challenge of the United States' action in recognizing the tribal government and is an attempt to void that action. It is impossible to separate the interest of the United States from the interest of the tribal government in this respect. If successful, the suit would destroy the only group with which the United States can deal in supervising the many aspects of tribal life for which it is responsible.

The attack upon the proposed and actual tribal expenditures is an attack upon the cooperative action of the United States and the tribal government; the interests of the two are not severable. The tribal fund is administered cooperatively and establishment of the invalidity of the expenditures necessarily requires a finding of the invalidity of the cooperative action. This would obviously have an injurious effect upon the ab-

sent party because it would invalidate its action without its presence.[3]

The question of the indispensability of the United States has arisen in a number of cases specifically concerned with tribal property and, even without the foregoing analysis, the rule advanced is unquestionably established. The leading case of *Morrison* v. *Work*, 266 U.S. 481 (1925), parallels this suit in that it was also an attempt by an individual tribal member to attack the management and disposition of tribal property and funds administered by the Secretary of the Interior, 266 U.S. at 483, and to claim that they were the individual property of the tribal members. The court said (266 U.S. at 485-486):

> * * *. It is admitted that, as regards tribal property subject to the control of the United States as guardian of Indians, Congress may make such changes in the management and disposition as it deems necessary to promote their welfare. The United States is now exercising, under the claim that the property is tribal, the powers of a guardian and of a trustee in possession. Morrison's contention is that, by virtue of the Act of 1889 and the agreements made thereunder, the ceded lands ceased to be tribal property and the rights of the Indians in the lands and in the fund to be formed became fixed as in-

---

[3] It should be remembered that in suits touching the proper execution of a trust, the trustee is an indispensable party. *Thayer* v. *Life Association of America*, 112 U.S. 717, 719 (1885); *Osage Tribe of Indians* v. *Ickes*, 45 F.Supp. 179, 182, fn. 17 (D.D.C. 1942) aff'd, 133 F.2d 47 (C.A. D.C. 1943), cert. den., 319 U.S. 750. The United States occupies a position comparable to a trustee in supervising the tribal funds.

> dividual property. The Court of Appeals held this contention to be unfounded. We have no occasion to determine whether it erred in so ruling. The claim of the United States is, at least, a substantial one. To interfere with its management and disposition of the lands *or the funds* by enjoining its officials, would interfere with the performance of governmental functions and vitally affect interests of the United States. *It is, therefore, an indispensable party to this suit.* [Citing cases.] It was not joined as defendant. Nor could it have been, as Congress has not consented that it be sued. [Citing cases.] (Emphasis added.)

In that case, the plaintiff was attempting to enjoin the Secretary directly, while here appellant is attempting to do so indirectly, by enjoining the tribal officials, but the resultant interference with the performance of governmental functions is the same; indeed, this is an easier case than *Morrison*, because the same result is desired here and no attempt has been made to join even the Secretary.

In *Minnesota* v. *United States*, 305 U.S. 382 (1939), the State had attempted to condemn Indian lands and had joined the United States. The United States' motion to dismiss for lack of consent to suit had been denied in the trial court on the ground that the United States was not a necessary party and that consent had been granted by a named statute. The Supreme Court affirmed an appellate court reversal of the trial court, and stated (305 U.S. at 386-387):

> *First.* The United States is an indispensable party defendant to the condemnation proceedings. A proceeding against property in which the United States has an interest is a suit against

> the United States. (Citing cases.) It is confessedly the owner of the fee of the Indian alloted lands and holds the same in trust for the allottees. As the United States owns the fee of these parcels, the right of way cannot be condemned without making it a party. (Footnote omitted.) The exemption of the United States from being sued without its consent extends to a suit by a State. (Citing cases.)

The court made it clear in footnote 1, p. 386, that the key to the indispensability was not the nature of legal title held by the United States, but the historic relationship between the United States and the Indians. *Grand River Dam Authority* v. *Parker*, 40 F. Supp. 82, 85 (N.D. Okla. 1941); *Osage Tribe of Indians* v. *Ickes*, *supra*, p. 6, at p. 182, fn. 17. Similarly, in *United States* v. *Hellard*, 322 U.S. 363 (1944), the Court held that a partition proceeding that divested Indians of the Five Civilized Tribes of title to restricted land was invalid where the United States was not a party. The Court left no doubt that, absent congressional direction to the contrary, the United States must be present in suits dealing with Indian property. 322 U.S. at 367-368. Accord: *United States* v. *Candelaria*, 271 U.S. 432, 441-445 (1926); *Naganab* v. *Hitchcock*, 202 U.S. 473, 475-476 (1906); *Grand River Dam Authority* v. *Parker*, 40 F. Supp. 82, 84-86 (N.D. Okla. 1941); *First Nat. Bank of Holdenville, Okl.* v. *Ickes*, 60 F.Supp. 366, aff'd, 154 F.2d 851 (C.A.D.C. 1946) 370-371 (D. D.C. 1945); see *Barnes* v. *United States*, 205 F.Supp. 97, 100-101 (D. Mont. 1962). Although the fund here in question is not a restricted or trust

allotment of Indian land or direct proceeds from their sale, as was the subject matter in certain of the cited cases, the authority exercised by the United States in those cases is virtually identical with the control exercised here over the tribal judgment funds. Compare 25 U.S.C. sec. 409a, with Act of April 24, 1961, Pub. L. 87-24, 75 Stat. 45. The tribal funds are restricted in the same sense and the aim of the suit to divest the United States and the tribal entity of the fund is the same as in the cited cases, so that the identical considerations make the United States indispensable. As the court stated in *First Nat. Bank of Holdenville, Okla.* v. *Ickes, supra,* p. 8, at pp. 370-371:

> Since the object of the present suit is to declare invalid the Government's exercise of power under [certain statutes], the United States of America would be an indispensable party to the granting of the relief sought. It is firmly established that the United States has an interest in restricted Indian property, and that this interest of the sovereign may not be foreclosed by a judgment in proceedings in which the United States is not a party. (Citing cases.)

The name given to the interest of the United States or to the position it occupies has varied from case to case, but in each case one fact stands out with pristine clarity: When an attempt is made to divest the tribe of property over which the United States has retained supervisory control, the United States is an indispensible party to the proceeding. *Osage Tribe of Indians* v. *Ickes, supra,* p. 6, at p. 182, summarizes the United States' position:

> If the present case were to go to trial and judgment, and if in such a judgment plaintiffs' contention should maintained, it is obvious that the claim of the United States, that it is a trustee in possession, with power to act, would be decided against it without an opportunity to be heard.

The foregoing analysis illustrates that the United States has a substantial interest in a suit of this nature, that its presence is required, and that it cannot be joined because it has not consented to be sued. For those reasons, the district court correctly dismissed this suit.

III

THE DISTRICT COURT DOES NOT HAVE JURISDICTION OF THE SUBJECT MATTER

This suit is nothing more than an attempt to bring into the federal courts a tribal political question. As the Tenth Circuit said in a case very similar to this one, *Prairie Band of the Pottawatomie Tribe* v. *Puckkee*, 321 F. 2d 767, 770 (1963):

> In essence, this is a private civil dispute between Indians of the same Tribe and Band, concerning the method and procedure for distribution of the proceeds of a judgment, which have become tribal funds, to be distributed under the authority of the tribal governing body. It is an intra-tribal controversy, over which Federal court jurisdiction has been traditionally denied. See: *Martinez* v. *Southern Ute Tribe*, 249 F. 2d 915; *Native American Church* v. *Navajo Tribal*

Council, 272 F.2d 131; and *Dicke* v. *Cheyenne-Arapaho Tribes*, 304 F.2d 113.

Numerous other recent decisions make it clear that the federal courts do not have jurisdiction of the subject matter of suits involving internal tribal affairs, even when constitutional questions are sought to be raised. *Williams* v. *Lee*, 358 U.S. 217, 219-220 (1959); *Native American Church* v. *Navajo Tribal Council*, 272 F.2d 131, 133-135 (C.A. 10, 1959); *Barta* v. *Oglala Sioux Tribe of Pine Ridge Reservation*, 259 F.2d 553, 556-557 (C.A. 8, 1958), cert. den., 358 U.S. 932; *Iron Crow* v. *Oglala Sioux Tribe of Pine Ridge Res.*, 231 F.2d 89 (C.A. 8, 1956). Therefore, the district court correctly dismissed the suit.

IV

APPELLANT HAS NOT STATED A CAUSE OF ACTION

Even if procedurally, this suit would lie, it is plain that no cause of action has been stated. Cutting through the conclusory allegations of invalidity and illegality, we see that the real purpose of the suit is to compel a total per capita distribution of the seven million dollar judgment fund (R. 1, par. II; R. 2, par. V). The judgment fund is the result of a judgment obtained, under the Indian Claims Commission Act, against the United States and can be disbursed only pursuant to the congressional authorization. See 25 U.S.C. secs. 70t, 70u; *Minnesota Chippewa Tribe* v. *United States*, 315 F.2d 906, 914, fn. 11 (C. Cls. 1963). Congress has made that disbursement sub-

ject to several conditions, one of which is that all expenditures must be "authorized by the respective tribal governing bodies and approved by the Secretary of the Interior." 75 Stat. 45. The restriction is in accord with the paramount authority of Congress over tribal property. *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 568 (1903); *Tiger* v. *Western Investment Co.*, 221 U.S. 286, 311 (1911).

Appellant is in the contradictory position of wanting the benefits of the appropriation act but being unwilling to accept the conditions attached by Congress to the use of the funds appropriated. It is too well-established to require extended discussion that appellant has no individual vested interest in the fund. *Minnesota Chippewa Tribe* v. *United States*, 315 F.2d 906, 913-914 (C.Cls. 1963); see *Morrison* v. *Work*, 266 U.S. 481, 485 (1925). It is likewise clear that a party who benefits by a statute may not accept those benefits but claim that the conditions, restrictions, or limitations specified in the statute are invalid. As recently stated in *United States* v. *Kassan*, 208 F.Supp. 858 (S.D. Cal. 1962) at p. 861:

> * * * [T]he defendant, having requested and accepted the benefit of the Act and regulations, is estopped to claim this invalidity.

See *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 501-502 (1955); 31 C.J.S., Estoppel sec. 110(8), pp. 580-581. In order to accept the benefits of this judgment fund, appellant must accept all of the conditions placed upon the use of that fund; he must accept those benefits and con-

ditions in common with the rest of the tribe and not under some claim of individual ownership of some portion of the fund. Congress has specified the procedure for expanding the fund, the Secretary and the tribal governing body have acted in exact accordance with that procedure and appellant has shown nothing that would justify judicial intervention in the procedure.

Thus, appellant has failed to state a cause of action and the district court correctly dismissed this suit.

CONCLUSION

For the foregoing reasons, the United States submits that the district court correctly decided this case and its judgment should be affirmed.

Respectfully,

RAMSEY CLARK,
Assistant Attorney General.

SYLVAN A. JEPPESEN,
United States Attorney,
Boise, Idaho, 83701.

ROGER P. MARQUIS,
RICHARD N. COUNTISS,
Attorneys,
Department of Justice,
Washington, D. C., 20530.

APRIL 1964.

Certificate of Examination of Rules

I certify that I have examined the provisions of Rules 18 and 19 of the Ninth Circuit and that in my opinion the tendered brief is in compliance with all requirements.

Richard N. Countiss
Attorney, Department of Justice,
Washington, D. C., 20530

☆ U. S. GOVERNMENT PRINTING OFFICE: 1964 727921 863